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IN THE

Supreme Court of the United States

October Term, 1995

ARNOLD D. BERKELEY,

Petitioner,

v.

HOME INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. In its Brief in Opposition, Home does not dispute that, if the Petition properly frames the question presented, the Petition should be granted. Rather, Home argues that the Court of Appeals' decision is one of law on an issue not

decided by the trial court, i.e., that Berkeley had committed a "deliberately wrongful act." But Home ignores the crucial point: the decision below includes the material finding of fact that Berkeley acted "deliberately." And as to that material factual issue, Berkeley had no opportunity to demonstrate that there is a genuine dispute.[1] That is the basis of the Petition; it is completely ignored in the Brief in Opposition.

The motions before the District Court were indeed based solely upon issues of law. Home's motion to dismiss both the coverage and indemnity claims was based upon its argument that Berkeley's dispute with AEPCO was solely over a return of fees, and Berkeley's motion for partial summary judgment as to liability was based upon contract interpretation and insurance law issues. Upon neither of these motions did Berkeley have any reason to argue that there was a genuine issue of material fact for the trial court to determine. Clearly, such an argument would have been an improper response to the motion to dismiss. And, it would have been absurd for Berkeley to make that argument in support of his own motion for summary judgment.

The District Court decided the motions before it as a matter of law. It denied the motion to dismiss as to the claim for coverage but granted it as to the indemnity claim. It held as a matter of law that an "[i]mpropriety of a lawyer

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[1]There was no issue of deliberateness before either the arbitrators or the Bar Counsel, and neither made any finding of fact that Berkeley acted "deliberately." The District Court, of course, acting upon two motions of law, also had no occasion to make a finding on this factual issue. Thus, the Court of Appeals, in shifting the basis of decision to a determination of deliberateness, necessarily made the factual finding de novo.

is or should be recognized as 'dishonesty' within the meaning of the exclusion provision" of the insurance policy.(App. 27)

As Home points out, the Court of Appeals did not affirm the holding that an impropriety by a lawyer is, as a matter of law, "dishonesty." (App. 12) Rather, the Court of Appeals found that Berkeley had committed a "deliberately wrongful" act. (Id.) And it did so without giving Berkeley an opportunity to present contrary evidence that, while his act may have been "wrongful," it was not "deliberate." Thus, the Court of Appeals deprived Berkeley of his right under Federal Rule of Civil Procedure 56(c) to demonstrate that there was a genuine issue on this fact first made material by the Court of Appeal's decision.

The distinction that eludes Home can be seen from examining what would have happened had Home made a motion in the trial court for summary judgment based upon an argument that Berkeley's action was "deliberately wrongful." In that case, Berkeley would have then had the opportunity provided in Federal Rule 56 to demonstrate that, while it might be concluded as a matter of law that the act found to have been an impermissible conflict was a "wrongful" act, there was a genuine issue as to the material fact of whether that act was "deliberately" wrongful, as the policy's exclusion clause required.[2] The Court of Appeals' action in this case deprived Berkeley of that opportunity.

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[2]There can be no question that the issue of "deliberateness" is a factual issue. Home recognized this in the District Court when it filed a Rule 56(f) motion seeking discovery "to establish that [Berkeley's]....conduct was deliberately wrongful." (App. 6). The District Court rejected this motion, and the Court of Appeals affirmed. (Id.)

This action of the Court of Appeals ignored the admonition earlier laid down -- to the same Court of Appeals -- in *Fountain v.* Filson, 336 U.S. 681 (1949), that courts, in disposing of cases summarily, adhere to the protections provided by Federal Rule 56. With the increased number of summary dispositions, encouraged in part by this Court's 1986 trilogy of summary judgment cases, the importance of that protection has grown, and the significance of the action of the Court of Appeals in this case of ignoring the *Fountain* admonition has grown. Home's attempt in its Brief in Opposition to justify the action of the Court of Appeals by ignoring it is an apt underline to the need for this Court to speak on this subject at this time.

II. Again, Home does not meet the issue concerning damages. There was no factual dispute before the District Court concerning damages; Home never disputed any of the facts presented by Berkeley. Rather, all of the District Court's rulings addressed the construction of the insurance policy or the content of insurance law -- each a question of law.

The clearly erroneous standard of Federal Rule of Civil Procedure 52(a) by its very terms applies to decisions concerning facts that are in dispute, not to conclusions of law based upon those facts. Each of the issues before the Court of Appeals on the damages phase of this case was an issue of law, to be determined de novo by the Court of Appeals, not a review of determinations of disputed questions of fact.

In this era of increased use of summary judgment, Home's attempt to turn rulings of law into determinations of

factual disputes underlines the importance of the issue as to the proper standard to be applied in reviewing such rulings.

CONCLUSION

For the foregoing reasons and those given in the Petition, we urge that a writ of certiorari issue in this case.

Respectfully Submitted,

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